Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5464

FRANK W. SHARP,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1976

No.

FRANK W. SHARP,

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v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Frank W. Sharp respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 15, 1976.

OPINION BELOW

The judgment of the Court of Appeals, not reported, appears in the appendix hereto, as do the orders of that Court on petitioner's joint petition for rehearing and/or

suggestion for rehearing *en banc* and the order of dismissal entered by the District Court for the District of Columbia.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 15, 1976, affirming the United States District Court's Order, dated October 15, 1975, dismissing the complaint. The Court of Appeals denied a timely joint petition for rehearing and/or suggestion for rehearing *en banc* on July 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the exercise of jurisdiction by a state court over a state bank receivership deprives a federal court of jurisdiction of a suit subsequently brought under the Freedom of Information Act for records of the federal government corporation which is acting as the receiver and has title to all receivership records.

(2) Whether certain records arising out of a federal government corporation's role as receiver of a state bank—which records are neither prepared for nor filed with a state court but are prepared for and submitted to the corporation's headquarters in Washington, D.C.—are subject to the Freedom of Information Act.

(3) Whether a federal government corporation which is subject to the Freedom of Information Act ceases being subject to the Act when it acts as receiver of a closed state bank.

(4) Whether a federal government corporation which is acting as receiver of a closed state bank is nevertheless subject to the Freedom of Information Act with respect to records it holds in its capacity as the federal insuror of the account holders of said bank.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5, §551

United States Code, Title 5, §552

United States Code, Title 12, §1819 Fourth

Vernon's Annotated Texas Statutes:

Art. 342 - 806

Art. 489b §7

STATEMENT OF THE CASE

Petitioner Frank W. Sharp invoked the jurisdiction of the district court under the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), to enjoin respondent's withholding of records requested pursuant to that Act.

On July 9, 1975, counsel for petitioner in a letter to respondent's general counsel requested, pursuant to the Freedom of Information Act, copies of documents in the FDIC's possession, custody or control arising out of its role as receiver of the closed Sharpstown State Bank of Houston, Texas (see Appendix, at 11a). By its letter dated July 23, 1975, respondent's chairman denied petitioner's request, arguing that the FDIC is not a federal agency within the meaning of the Freedom of Information Act when it acts as a receiver of a state-chartered bank (see Appendix, at 13a).

By letter dated July 29, 1975, petitioner through counsel appealed the FDIC chairman's denial to the FDIC board of directors (see Appendix, at 15a). By letter dated August 28, 1975, respondent's executive secretary informed petitioner through counsel that respondent's directors had affirmed its chairman's denial of the request (see Appendix, at 17a).

Petitioner commenced the instant proceeding for injunctive relief in United States District Court for the District of Columbia on August 29, 2975. The district court granted respondent Federal Deposit Insurance Corporation's motion to dismiss October 15, 1975, stating that the court lacked jurisdiction (1) over respondent as receiver of a closed state bank and (2) over the records of the closed state bank and that the complaint failed to state a claim upon which relief might be granted inasmuch as the Freedom of Information Act does not apply to the FDIC as a receiver or to the records it compiles or maintains as a receiver (see Appendix, at 8a).

The Court of Appeals affirmed the district court's order of dismissal on other grounds, concluding that "the documents requested in this case are *in custodia legis* before a state court in receivership proceedings to which [petitioner] is a party" (see Appendix, at 1a).

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE DOCTRINE OF *IN CUSTODIA LEGIS* APPLIES TO A FREEDOM OF INFORMATION ACT REQUEST IS A QUESTION OF FIRST IMPRESSION.

The Court of Appeals affirmed the district court's dismissal of petitioner's Freedom of Information Act ("FOIA") action below on the ground that "the documents requested in this case are *in custodia legis* before a state court in receivership proceedings"[1] (see Appendix, at 1a). Pursuant to the Texas Banking Code, V.A.T.S. Art. 342-806, "the assets of the [closed state] bank shall be deemed to be in the custody of the court in which such [liquidation] proceedings are pending".[2]

Petitioner raises the question of first impression as to whether the doctrine of *in custodia legis*, to the extent it is applicable to the records he has requested,[3]

---

[1] The Court of Appeals suggests that petitioner is a party to the Texas receivership proceeding and, therefore, should not be permitted to use the FOIA as a discovery device. Petitioner submits that the *only* parties to the receivership are respondent and the bank.

[2] "The documents, books and records are owned by the bank and constitute part of its property." Judgment, District of Columbia Court of Appeals, June 15, 1976, at 2, see Appendix at 1a. See *Ogden v. Edwards*, 108 S.W.2d 675 (Texas Civ. App. 1937).

[3] As receiver of the closed bank, respondent periodically submits, *inter alia*, activity and status reports to its headquarters in Washington, D.C., which documents are neither prepared for nor submitted to a state court. Petitioner submits that its FOIA request below covered these records and that to the extent that the court below refused to determine whether petitioner should have access to these records, said court was clearly in error.

prevents a federal court whose jurisdiction is invoked under the FOIA from acting with respect to the requested records.

This Court has defined *in custodia legis*—to wit, that once one court, be it federal or state, has taken jurisdiction over a receivership and the property therein, a second court cannot interfere with or disturb the first court's possession or control thereof. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *United States v. Klein*, 303 U.S. 276 (1938); *Princess Lida v. Thompson*, 305 U.S. 456 (1939).

However, where as in this FOIA action petitioner merely seeks *copies* of documents which are possessed by respondent and where the granting of petitioner's requested relief should not disturb the possession or control of a state court over the bank receivership proceedings, the rule of non-interference by federal courts in pending state court proceedings would not appear to apply. *Fischer v. American United Life Ins. Co.*, 314 U.S. 549 (1942); *Markham v. Allen*, 326 U.S. 490 (1946).

Additionally, petitioner's FOIA action is in personam—not in rem. It, thus, further appears that principles of comity would not require a district court to renounce its FOIA jurisdiction over respondent in favor of the Texas state court's jurisdiction over the receivership proceedings. *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922); *Wilhoit v. Federal Deposit Insurance Corporation*, 143 F.2d 14 (6th Cir. 1943).

Whether a federal court may pursuant to the FOIA determine petitioner's rights to copies of records in respondent's possession without thereby conflicting with a state court's authority to decide questions within its own jurisdiction is a question of first impression under the FOIA.

II.

WHETHER THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS A FEDERAL GOVERNMENT CORPORATION, IS SUBJECT TO THE FREEDOM OF INFORMATION ACT WHEN IT ACTS AS A RECEIVER IS A QUESTION OF FIRST IMPRESSION.

Respondent claims to act in two separate capacities: as a federal insuror of bank deposits and as a state receiver of closed state banks. Certain federal statutes and reported opinions have recognized respondent's two capacities but *only* in clearly delimited areas.[4]

Petitioner questions whether this dichotomy between respondent's two activities, which clearly applies to *financial obligations of closed state banks*, should also be applied to a Freedom of Information Act (FOIA) request for records which are in the possession, custody and control of respondent—indeed, to which respondent

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[4]Pursuant to 12 U.S.C. §1819 Fourth, "all suits of a civil nature at common law or in equity to which [respondent] shall be a party shall be deemed to arise under the laws of the United States . . . except that any such suit to which [respondent] is a party in its capacity as receiver of a State bank and *which involves only the rights or obligations of depositors, creditors, stockholders*, and such State bank *under State law* shall not be deemed to arise under the laws of the United States." (Emphasis supplied.)

In ruling on actions involving *financial obligations* of closed State banks, federal courts have agreed. *Freeling v. Sebring*, 296 F.2d 244 (10th Cir. 1961); *Federal Deposit Insurance Corporation v. Glickman*, 450 F.2d 416 (9th Cir. 1971); *TPO, Inc. v. Federal Deposit Insurance Corporation*, 325 F.Supp. 663 (S.D. N.Y. 1971); *DeLorenzo v. Federal Deposit Insurance Corporation*, 259 F.Supp. 193 (S.D. N.Y. 1966).

holds legal title.[5] Respondent answers that all records created or held by it as a receiver do not fall under FOIA coverage but are instead in the custody of a Texas state court pursuant to the Texas Banking Code, V.A.T.S. Art. 342-801 *et seq*.

The FOIA applies to respondent.[6] The FOIA does not differentiate between respondent's or any other government corporation's various activities. The FOIA does not state that it applies only part of the time. Whether respondent may in effect remove itself from under the coverage of the FOIA by becoming a receiver is an important question touching on both the policy behind and interpretation of the FOIA. Furthermore, whether respondent as federal insuror–regardless of its status as a receiver in Texas–remains subject to the FOIA for records sent to its national headquarters by its personnel handling the receivership in Texas is yet unanswered.[7]

[5] Vernon's Annotated Texas Statutes, Art. 489b §7, provides that respondent when acting as receiver of a Texas state bank shall have "possession and title to all the assets, business and property of" the closed bank.

[6] The 1974 amendments to the FOIA clearly extend the Act's coverage to "any . . . Government Corporation . . . or any independent regulatory agency," 5 U.S.C. §552(e), as amended, P.L. 93-502 (1974). Congress stated in the conference report on this amendment "that they intend to include within the definition of 'agency' those entities encompassed by 5 U.S.C. §551 . . . and government corporations or government-controlled corporations now in existence or which may be created in the future." Conf. Committee Rept. 93-1380, reproduced in "Freedom of Information Act and Amendments of 1974 (P.L. 93-502)" Joint Committee Print, 94th Cong., 1st Sess., March 1975, at 231.

[7] Petitioner's FOIA request was for "all documents arising out of [respondent's] role as receiver." Respondent's counsel admitted during oral argument before the Court of Appeals that certain reports and documents are prepared by respondent's receivership personnel solely for submission to respondent's headquarters.

III.

THE COURT OF APPEALS' INTERPRETATION OF THE TEXAS BANKING CODE IS OF DOUBTFUL VALIDITY.

The Court of Appeals' determination in this action appears to be incorrectly founded on the Texas statute that provides "the assets of the [closed state] bank shall be deemed to be in the custody of the [state] court in which such [receivership] proceedings are pending and all suits and orders provided for under . . . [the Texas Banking Code] shall be deemed to be in the nature of interventions or orders in said proceedings, of which suits and orders said court shall have exclusive jurisdiction" Art. 342-806.

Inasmuch as Petitioner's FOIA request and subsequent court action are unrelated to the Texas Banking Code and are not "provided for under" the Code, they clearly could not be deemed to have arisen under Texas law. The Court of Appeals' conclusion that V.A.T.S. Art. 342-801 *et seq*. precluded petitioner's FOIA action in federal court appears to be of doubtful validity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the District of Columbia Circuit.

Respectfully submitted,

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1701 Pennsylvania Avenue, N.W.
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Telephone: 202-298-9030

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUBMIA CIRCUIT

No. 75-2191 [No Opinion]

Frank W. Sharp,
Appellant

v.

Federal Deposit Insurance Corporation,
Appellee

Appeal from the United States District Court for the District of Columia.

Before: WRIGHT, MACKINNON and ROBB, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The directors of Sharpstown State Bank, a Texas banking corporation, "voted to close same and place it in the hands of the Texas Banking Commissioner for liquidation pursuant to Article 342-801 *et seq.*, Vernon's Annotated Texas Statutes." Appellant's Brief 5. The applicable Texas statute provides that when a state bank is insolvent or imminently insolvent "its board of directors [may] close the bank and place it in [the

State Banking Commissioners] . . . hands for liquidation." Vernon's Annotated Texas Statutes Art. 342-903 (West 1973). The Commissioner appointed the Federal Deposit Insurance Corporation (FDIC) as Receiver for the bank. This had the effect of placing the FDIC in the shoes of the State Banking Commissioner. *Id.*, Art. 489b, Sec. 3.

The Texas Banking Statutes further provide: "The methods of liquidation of state banks as provided in this Code shall be exclusive. . . ." (*Id.*, Art. 342-801). "The assets of the bank shall be deemed to be *in the custody of the court* in which such proceedings are pending and all suits and orders provided for under this chapter [Art. 342-801 *et seq.*] shall be deemed to be in the nature of interventions or orders in said proceedings, of which suits and orders said court shall have exclusive jurisdiction. (*Id.*, Art. 342-806) (emphasis added). Thus, when an insolvent bank is being liquidated under the Texas statute its property is *in custodia legis*, and the court of the county where the bank is located has exclusive jurisdiction and custody of its property. *Ogden v. Edwards*, 108 S.W.2d 675 (Tex. Civ. App. 1937); *Chapman v. Guaranty State Bank*, 267 S.W. 690 (Tex. Civ. App. 1925); *Kidder v. Hall*, 113 Tex. 49, 251 S.W. 497 (1923). The documents, books and records are owned by the bank and constitute part of its property. The liquidator in charge has the status of a receiver. *Arlitt v. Seaboard Bank and Trust Co.*, 31 S.W.2d 488 (Tex. Civ. App. 1930).

Appellant, in this action in federal court, claiming reliance on the Federal Freedom of Information Act, 5 U.S.C. §551 *et seq.*, has demanded that the FDIC produce all the "documents in its possession, custody and control arising out of its role as receiver of the Sharpstown State Bank of Houston, Texas." Appellant's

Complaint, para. 1. This request was denied by the FDIC on the ground that since it was acting under Texas law as Receiver of a Texas State Bank the FDIC was not holding the documents in question as a federal "agency" within the meaning of the Freedom of Information Act. The decision of the District Court affirmed the position of the FDIC.

In recent cases the Supreme Court has indicated that: "Discovery for litigation purposes is not an expressly indicated purpose of the [Freedom of Information] Act," *Renegotiation Board v. Bannercraft*, 415 U.S. 1, 24 (1974), and that: "[A litigant's] rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

The documents requested in this case are *in custodia legis* before a state court in receivership proceedings to which Mr. Sharp is a party. Mr. Sharp should seek his discovery in that court.

On consideration of the foregoing, it is ordered and adjudged by this court that the order of the District Court of October 15, 1975 appealed from in this cause, insofar as it dismisses plaintiff's cause, is hereby affirmed.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 15 1976

GEORGE A. FISHER
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2191 September Term, 1975
Civil Action 75-1428

Frank W. Sharp,

Appellant

v.

Federal Deposit Insurance Corporation

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, Mackinnon, Robb and Wilkey, Circuit Judges.

ORDER

The suggestion of appellant Sharp for rehearing *en banc*, and of his motion for expedited handling as mandated by the Freedom of Information Act, having been transmitted to the full Court and no Judge having requested a vote thereon, and it being the practice of this Court to promptly circulate petitions seeking rehearing and/or suggestions for rehearing *en banc* without delay, it is

ORDERED by the Court *en banc* that appellant's aforesaid motion for expedited handling is denied, and it is

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 21 1976

GEORGE A. FISHER
CLERK

FURTHER ORDERED by the Court *en banc* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2191 September Term, 1975
Civil Action 75-1428

Frank W. Sharp,

Appellant

v.

Federal Deposit Insurance Corporation

Before: Wright, MacKinnon and Robb, Circuit Judges.

ORDER

On consideration of the petition for rehearing filed by appellant Sharp, it is

ORDERED by the Court that appellant's aforesaid petition for rehearing is denied.

United States Court of Appeals
for the District of Columbia Circuit
FILED JUL 21 1976
GEORGE A. FISHER
CLERK

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

No. 75-2191 – Sharp v. F.D.I.C.

MEMORANDUM FILED BY MACKINNON,
CIRCUIT JUDGE

Appellant in his motion for rehearing asserts that he is not a party in litigation in the Texas receivership proceeding. To whatever extent the point may be valid, it is overly technical. Frank W. Sharp and Sharpstown Realty Company *are* both parties in the court proceedings for liquidation of Sharpstown State Bank, Houston, Texas, in Harris County, Texas, 152nd Judicial District in the motion of November 24, 1975 for an order requiring the Federal Deposit Insurance Corporation, as receiver of Sharpstown State Bank (the "Receiver") to produce, etc., certain information there specified (App. 22). That was the proceeding referred to in this court's disposition.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 15 1975
JAMES F. DAVEY, Clerk

Civil Action No. 75-1428

FRANK W. SHARP,
Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant.

ORDER

Defendant having moved to dismiss and plaintiff having opposed, and the Court having thoroughly considered the briefs of the parties, it is hereby

ORDERED that the motion to dismiss the action be and hereby is granted upon the ground that this Court lacks jurisdiction over the defendant Federal Deposit Insurance Corporation as Receiver of Sharpstown State Bank, Houston, Texas, and lacks jurisdiction over the records of that receivership. Furthermore, the complaint fails to state a claim upon which relief might be granted in that 5 U.S.C. §552 does not apply to the defendant as receiver of Sharpstown State Bank or to the records it has compiled and/or maintained in that capacity, for the reasons summarized in the statement of conclusion commencing on page 7 of defendant's memorandum of points and authorities in support of its motion.

/s/Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

October 15, 1975

[Page 7 of defendant's memorandum of points and authorities.]

The records which are herein sought to be disclosed were generated and maintained by and are the property of a Texas state bank in liquidation. Pursuant to state law all such property is in the continuing custody of a state court. When acting as receiver for a closed insured bank, the FDIC stands in the shoes of that bank. Its rights, powers, duties and very existence as such receiver are governed by state law. The statutory scheme of the Federal Deposit Insurance Act and numerous judicial decisions have clearly established that the FDIC as receiver is an entity which is entirely separate and distinct from the FDIC in its corporate capacity. The records which are the subject matter of this suit relate exclusively to the FDIC's receivership capacity and they are held by FDIC solely in that capacity. In this legally distinct and highly specialized capacity, the FDIC is not a government agency as defined by 5 U.S.C.A. §552. Hence, the entity which was sued in this action, the FDIC in its corporate capacity, is not the entity which compiled or has custody over the records of the Sharpstown receivership. The proper party is the FDIC as receiver. However, this court has no jurisdiction over the receiver or its records and the Freedom of Information Act has no application to either the receiver or the

receivership records. Therefore, it is respectfully requested that the action be dismissed.

Respectfully submitted,

/s/J. Graig Gilliland
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July 9, 1975

HAND DELIVER

Mr. Edward Bransilver
General Counsel
Federal Deposit Insurance Corporation
Room 4025
550 Seventeenth Street, N.W.
Washington, D.C. 20429

Dear Mr. Bransilver:

Pursuant to the provisions of the Public Information Amendment to the Administrative Procedure Act, Title 5 United States Code, Section 552, as amended, and Title 12, Code of Federal Regulations, Part 309, we hereby request that you provide us copies of all documents in your possession, custody or control arising out of the Federal Deposit Insurance Corporation's role as receiver of the Sharpstown State Bank of Houston, Texas. The time period covered by this request commences with the appointment of the Corporation as receiver on January 27, 1971 following the closing of the Sharpstown State Bank on January 25, 1971, and runs to the date of this writing.

We enclose herewith a check for $20.00 as an initial deposit toward copying costs in the event that any of

the records herein requested may be deemed by the Corporation to fall within subdivisions (i), (ii) and (iii) of subparagraph (3) of paragraph (a) of 12 C.F.R. §309.1.

Mindful of the provisions of 5 U.S.C. §552 (a)(6), we look forward to your response to this request within ten working days of your receipt hereof.

Cordially,

/s/Charles Emmet Lucey
Charles Emmet Lucey

Enclosure: Check No. 1597, $20.00.

FEDERAL DEPOSIT INSURANCE CORPORATION
Washington, D.C. 20429

Office of the Chairman July 23, 1975

Charles Emmet Lucey, Esq.
Harrison, Lucey, Sagle & Solter
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Lucey:

This refers to your July 9, 1975 letter to Mr. Bransilver. You have requested under the Freedom of Information Act (5 U.S.C. §552) that the Corporation provide you with copies of "all documents in [our] possession, custody or control arising out of the Federal Deposit Insurance Corporation's role as receiver of the Sharpstown State Bank of Houston, Texas" for the period from the appointment of the Corporation as Receiver of the bank to the present. You have enclosed a check for $20 as an initial deposit for duplication fees.

Your request is denied. The Freedom of Information Act applies to records of a Federal "agency" as that term is defined in subsection (e) of the Act (5 U.S.C. 552(e)). Although FDIC in its corporate capacity is a Federal agency within the meaning of the Act, it is not a Federal agency to the extent that it acts as receiver for a state-chartered bank. This is because FDIC is appointed and serves as receiver for a state-chartered bank pursuant to applicable State law. The records maintained by FDIC as Receiver for the Sharpstown State Bank are therefore not the records of a Federal agency.

Even assuming for purposes of your request that FDIC as Receiver of the Sharpstown State Bank is a Federal "agency" within the meaning of the Freedom of Information Act, your request is so broad that it does not reasonably describe those FDIC records to which you desire access, as is required under 5 U.S.C. 552(a)(3), and would also have to be denied on that basis. As worded, your request seems to encompass every document related to the four and one half years in which the FDIC has served as Receiver for the Sharpstown State Bank, as well as all existing bank records which came into the Receiver's custody or control subsequent to the closing of the bank. Literally hundreds of thousands of documents are involved, and it seems clear to us that the Corporation would be unable to function if it were repeatedly required to search for and evaluate every record of the many receiverships it administers.

You have the right to appeal the denial of your request to the Board of Directors of this Corporation within 30 business days following receipt of this letter. Should you decide to file an appeal, you should submit your appeal in writing to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, and include any additional information that you deem relevant to the Board's consideration thereof.

Your check in the amount of $20.00 is returned herewith.

Sincerely,

/s/Frank Wille
Frank Wille
Chairman

Law Offices
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1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone 202 293-9130

July 29, 1975

The Honorable Frank Wille
Chairman
Federal Deposit Insurance Corporation
550 Seventeenth Street, N.W.
Washington, D.C. 20429

Dear Mr. Wille:

By this letter, we wish to avail ourselves of the appeal's procedure set forth in your letter of July 23 rejecting our Freedom of Information Act request.

We are in disagreement with your argument with respect to whether or not the FDIC's receivership activities removes it from the "agency" status for purposes of the Act. Since there is no precedant of which we are aware, only your agreement to our request or a court test thereof will be dispositive of the issue.

As to whether or not our request meets the reasonable description of documents test of the Act, we are also in disagreement. However, in order to resolve this objection, we would be pleased to submit to your agency a list of the particular receivership activity reports which we are desirous of reviewing and to otherwise cooperate with your agency in lightening the workload.

Lastly, should a court resolution of the issues in our favor be obtained, I am sure that you are correct that your Agency will receive additional inquiries concerning other receiverships.

Cordially,

/s/Charles Emmet Lucey
Charles Emmet Lucey

FEDERAL DEPOSIT INSURANCE CORPORATION
Washington, D.C. 20429

Office of the Executive Secretary

August 26, 1975

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Harrison, Lucey, Sagle & Solter
Suite 500
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

SUBJECT: Appeal to the denial of request for documents arising out of FDIC role as receiver of the Sharpstown State Bank, Houston, Texas.

Dear Mr. Lucey:

Pursuant to the provisions of the Freedom of Information Act, your appeal to the denial of a request for documents arising out of this Corporation's role as receiver of Sharpstown State Bank, Houston, Texas, has been submitted to the Board of Directors.

This letter constitutes notification that the Board of Directors at its meeting held on August 28, 1975, formally denied your appeal. Director George A. LeMaistre and Director James E. Smith, Comptroller of the Currency, voted to deny and Chairman Frank Wille abstained from voting. The Board has affirmed the denial of your request on the grounds stated in Chairman Wille's letter of July 23, 1975.

Under Section 3 of the Administrative Procedure Act, you have the right to a judicial review of the denial of this appeal.

Sincerely,

/s/Alan R. Miller
Alan R. Miller
Executive Secretary

* * *

5 U.S.C. §551

For the purpose of this subchapter –

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . .

* * *

5 U.S.C. §552

(a) Each agency shall make available to the public information as follows:

* * *

(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4) . . . (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * *

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

12 U.S.C. §1819 Fourth

To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States.

* * *

VERNON'S ANNOTATED TEXAS STATUTES

Article 342-806. Inventory of Assets – Custodia Legis – Jurisdiction

Promptly after the Commissioner has acquired possession of the assets of a state bank for liquidation, he shall prepare and file in the office of the district clerk of the county of the bank's domicile an inventory of such assets, and the clerk shall assign a cause number to the proceedings so instituted. The assets of the bank shall be deemed to be in the custody of the court in which such proceedings are pending and all suits and orders provided for under this chapter shall be deemed to be in the nature of interventions or orders in said proceedings, of which suits and orders said court shall have exclusive jurisdiction. Provided, however, that during vacation of such court, the judge thereof shall be authorized to enter any of such orders and to conduct any hearing incident thereto.

* * *

Article 489b Sec. 7

Upon the acceptance of the appointment of receiver or liquidator aforesaid by said Corporation, the possession of and title to all the assets, business and property of such banking institution of every kind and nature shall pass to and vest in said Corporation and without the execution of any instruments of conveyance, assignment, transfer or endorsement.

Supreme Court, U. S.
FILED
DEC 8 1976
MICHAEL RODAK, JR., CLERK

No. 76-546

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK W. SHARP, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks access to documents that the Federal Deposit Insurance Corporation holds as receiver of an insolvent state bank.

Petitioner is a stockholder in the Sharpstown State Bank of Houston, Texas (C.A. App. 4).[1] The bank has been closed by its directors and placed in the hands of the Texas Banking Commissioner for liquidation (Pet. App. 1a-2a). The Commissioner appointed the Federal Deposit Insurance Corporation receiver (Pet. App. 2a).

On July 9, 1975, petitioner made a written request to the F.D.I.C., pursuant to the Freedom of Information Act, 5 U.S.C. 552, for copies of all documents in the F.D.I.C.'s possession arising out of its role as receiver of the bank

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[1] "C.A. App." refers to the appendix in the court of appeals.

(Pet. App. 11a). The request was denied on the grounds that the Act does not apply to the F.D.I.C. in its role as receiver of state-chartered banks and that the request was, in any event, so broad that it did not adequately describe the documents requested (Pet. App. 13a, 15a, 17a).

Petitioner then commenced this suit for injunctive relief in the United States District Court for the District of Columbia. The district court granted F.D.I.C.'s motion to dismiss on October 15, 1975, on the ground that the court lacked jurisdiction over either the F.D.I.C. in its capacity as receiver of Sharptown State Bank or the records of the receivership (Pet. App. 8a). The district court further held that the Freedom of Information Act does not apply to the F.D.I.C. as receiver of a state bank or to the records compiled or maintained by it in that capacity (Pet. App. 8a-9a).

On November 24, 1975, petitioner filed a motion in the state court that has jurisdiction over the receivership, requesting an order requiring the F.D.I.C. to produce a large volume of information regarding the status of the receivership (C.A. App. 22-23). Petitioner's motion was granted on December 4, 1975 (C.A. App. 24).

Petitioner nevertheless appealed the dismissal of his federal court action. The court of appeals affirmed on the ground that the records requested by petitioner are *in custodia legis* before a state court in receivership proceedings to which petitioner is a party, and that petitioner should seek his discovery in that court (Pet. App. 1a-3a).

The decision below is correct, it does not conflict with the decision of any other court of appeals, and petitioner has advanced no claim warranting further review by this Court.

1. Petitioner contends (Pet. 9) that the court of appeals incorrectly relied upon provisions of the Texas Banking

Code (Tex. Ann. Civ. Stat. Art. 342-806 (1973); see Pet. App. 21a). That statute provides that the assets of the insolvent bank shall be deemed to be in the custody of the state court in which the receivership proceedings are pending and that the state court shall have exclusive jurisdiction of all suits and orders in the receivership proceedings (*ibid.*). The court of appeals correctly ruled that the records sought by petitioner were "assets" of the closed bank, and that the Texas statute brought such assets within the custody of the supervising state court. *Arlitt* v. *Seaboard Bank & Trust Co.*, 31 S.W. 2d 488 (Tex. Civ. App.).

Petitioner apparently has conceded that this is the case. He intervened in the receivership proceedings to seek an order of the state court requiring the receiver to compile extensive lists and schedules of information requested by petitioner. The court of appeals correctly held that petitioner thereby became a party to the receivership proceedings and that petitioner should seek any further discovery of documents in those proceedings (Pet. App. 3a, 7a).

2. Contrary to petitioner's contentions (Pet. 5-8), the court of appeals also was correct in ruling that the records compiled or maintained by state bank receivers, including the F.D.I.C., are not subject to disclosure under the Freedom of Information Act. The F.D.I.C., in its capacity as the receiver of an insolvent bank, stands in the shoes of that bank. See *Freeling* v. *Sebring*, 296 F. 2d 244, 245 (C.A. 10); *Federal Deposit Insurance Corporation* v. *Glickman*, 450 F. 2d 416 (C.A. 9); 12 U.S.C. 1821(e), 1823. The F.D.I.C.'s distinct duties as receiver are to liquidate the assets of the bank and to distribute the proceeds in accordance with applicable state law and under the supervision of the state court. These duties do not involve the processes of federal governance to which the Freedom of Information Act is directed. Neither the language nor the legislative history of the Act indicates

that Congress intended to extend its coverage to the F.D.I.C.'s separate capacity as a state court receiver and thereby to expand the discovery rights of litigants in state receivership proceedings. Cf. *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.